

An appeal

- by -

Patrick Ash and Debra Lyn Willard operating as Spartan Refrigeration

- of a Determination issued by -

The Director of Employment Standards
(the “Director”)

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

TRIBUNAL MEMBER: John Savage

FILE No.: 2006A/2

DATE OF DECISION: March 8, 2006

DECISION

SUBMISSIONS

Debra Willard, for the Employer

Rob Pfeiffer, for Himself

Karen Madsen, for the Director of Employment Standards

OVERVIEW

1. Rob Pfeiffer (“Pfeiffer”) and Ramon Gemperle (“Gemperle”) filed complaints under Section 74 of the *Employment Standards Act* (the “Act”) alleging that Patrick Ash (“Ash”) and Debra Lyn Willard (“Willard”) operating as Spartan Refrigeration contravened the Act by failing to pay wages, vacation pay, and overtime. Spartan Refrigeration is a refrigeration business operating out of Kelowna B.C.
2. An investigation was conducted by the Delegate, and on October 18, 2005 preliminary findings were sent to Spartan Refrigeration, and when those findings were not disputed, the Delegate issued her Determination November 23, 2005 finding (1) that there were wages owing and (2) that the employer is Ash and Willard operating as Spartan Refrigeration. Willard appeals that Determination.
3. During the course of the investigation the Delegate searched the business licence of Spartan Refrigeration and found that the licence said that Spartan Refrigeration is operated by Ash. A BC Online Search showed that Spartan Refrigeration is a registered sole proprietorship of Ash.
4. Both complainants, however, stated that Ash and Willard, who were husband and wife, operated the business of Spartan Refrigeration. The Delegate found that Ash has more involvement with the “hands on” refrigeration duties and Willard has more involvement with the office and bookkeeping. Both complainants gave evidence that they regularly took direction from both Ash and Willard. Pay cheques were issued to the complainants from Ash and Willard, from Willard, and from Lantern Bookkeeping (a sole proprietorship registered to Willard).
5. Based on this information the Delegate wrote to Spartan Refrigeration on October 18, 2005 as follows:

“During the initial phase of the complaint investigation it appeared that the business was operating (sic) by Patrick Ash. However, in view of the evidence that has come to light during the course of the investigation, it is clear that Ms. Willard is an integral part of the operation of this business. Both Mr. Ash and Ms. Willard participated in the operation of the business, gave direction to and set priorities for Mr. Gemperle and controlled the assets of the business.

Based upon the information currently before me, it is my preliminary finding that the legal employer of Mr. Gemperle is Patrick Ash and Debra Lyn Willard operating as Spartan Refrigeration.”

6. A similar letter of the same date and with the same conclusion was sent to Spartan Refrigeration regarding the complaint of Pfeiffer. Both letters included the following request:

“If you disagree with the preliminary investigation findings, please provide written reasons and supporting evidence, if any, to this office by October 28, 2005”.
7. Spartan Refrigeration did not respond to the letter. Although three meetings were arranged with Willard two of those meetings were cancelled and Willard did not appear for the third.
8. The Delegate issued her Determination November 23, 2005 finding Ash and Willard to be the Employer. Willard appeals that finding. She says that Ash and Willard are now legally separated and there is a court action pending between them over the assets of Spartan Refrigeration and the property. There is an allegation of bias. There is also an allegation of an error in the Determination based on the time sheets, but no specific error is described.

ISSUES

9. Did the Delegate err in law in her Determination of who was the Employer?
10. Was there bias in the course of the Investigation?
11. Was there any error made in the Determination of the amounts due?

NATURE OF APPEAL

12. An appeal to the Employment Standards Tribunal is a limited appeal. Section 112(1) of the *Employment Standards Act* restricts the grounds of appeal as follows:

112 (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:

 - (a) the director erred in law;
 - (b) the director failed to observe the principles of natural justice in making the determination;
 - (c) evidence has become available that was not available at the time the determination was being made.
13. In a number of decisions of the Employment Standards Tribunal, panels have adopted the definition of “error of law” set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.). That definition can be paraphrased as finding an error of law where there is:
 1. a misinterpretation or misapplication of a section of a statute;
 2. a misapplication of an applicable principle of general law;
 3. acting without any evidence;
 4. acting on a view of the facts which could not reasonably be entertained; and

5. adopting a methodology that is wrong in principle.
14. It is not open to an appellant to appeal factual findings, findings of mixed fact and law (except in circumstances listed above), or to introduce new evidence on appeal that was available at the time the determination was made.
15. It follows that an appeal is not a complete re-examination of the complaint: *Re Syncon Investments Ltd.* BC EST #D094/97. Where a party declines to participate in the investigation, an appeal does not afford an avenue to introduce evidence that should have been presented during the investigation: *Tri-West Tractor Ltd.*, BC EST #D268/96; *Senor Rana's Cantina Ltd.*, BC EST #D017/05.

EMPLOYER

16. The term “employer” is defined in section 1 of the *Employment Standards Act*. The definition “includes” a person who has the control or direction of an employee or who is responsible, directly or indirectly, the employment of an employee.
17. In this case Willard notes that Spartan Refrigeration was a sole proprietorship registered to Ash. Willard also notes that she was estranged from Ash. The fact that Spartan Refrigeration was a sole proprietorship was in evidence before the Delegate. Whether or not Willard and Ash were estranged at some point, however, does not address the matters that formed the basis of the Delegate’s conclusion that Willard was an employer.
18. The complainants, Gemperle and Pfeiffer, gave evidence that both Willard and Ash were active in the day to day operation of the business. Both employees took direction from both Willard and Ash. The employees were variously paid by Willard and Ash jointly, by Willard, and by Spartan Refrigeration.
19. This evidence was summarized in two letters addressed to “Patrick Ash and Debra Lyn Willard operating as Spartan Refrigeration” both dated October 18, 2005. Willard and Ash were invited to respond to the Delegate’s “preliminary finding” that the employer was “Patrick Ash and Debra Lyn Willard operating as Spartan Refrigeration”.
20. Willard did not respond to these letters. The letters noted that earlier meetings were scheduled for September 26, 30 and October 3, 2005, but not attended by either Willard or Ash.
21. In these circumstances, it could not be said that the conclusion that the employer was Patrick Ash and Debra Lyn Willard operating as Spartan Refrigeration was a view of the facts which could not reasonably be entertained. Indeed, when invited to respond to an adverse finding, the failure to respond may give rise to an adverse inference, such as that drawn when a person who has material evidence fails to testify: *Lambert v. Quinn* (1994), 110 D.L.R. (4th) 284 (Ont. C.A.).

BIAS

22. In the appeal Willard raises an allegation of bias. It is alleged that someone in the Kelowna Office of the Employment Standards Branch made it clear to Willard that she and Ash were liars. As noted by

the Delegate, Willard has not provided any evidence, other than this bald statement, that the determination was not based on an investigation that was conducted impartially.

23. An allegation of bias is a serious matter in that it is a fundamental principle of natural justice that a party has right to be heard by an unbiased decision maker. The onus of establishing bias, however, lies on the person who alleges bias in the decision maker: *Paul Svisdahl*, BC EST #D068/03.

24. Newbury, J.A. in *Finch v. The Association of Professional Engineers & GEO Scientists* (1996), 18 B.C.L.R. (3d) 361 at 376 (B.C.C.A.) discussed the issue as follows:

The test for determining whether a reasonable apprehension of bias arises is well-known and clear: Cory J. for the Court in *Newfoundland Telephone Co. Ltd. v. Board of Commissioners of Public Utilities* (1992), 4 Admin. L.R. (2d) 121 (S.C.C.) formulated it this way:

It is of course, impossible to determine the precise state of mind of an adjudicator who has made an administrative board decision. As a result, the courts have taken the position that an unbiased appearance is, in itself, an essential component of procedural fairness.

To ensure fairness the conduct of members of administrative tribunals has been measured against a standard of reasonable apprehension of bias. The test is whether a reasonably informed bystander could reasonably perceive bias on the part of an adjudicator.

25. The test is an objective one. Two principles emerge from the case.

26. Because allegations of bias are serious allegations, they should not be found except on the clearest of evidence: see *A.B. Lumber Co. Ltd. and North Coast Forest Products Ltd. v. B. C. Labour Relations Board and another*, [1998] B.C.J. No. 1858, August 7, 1998, Vancouver Registry No. A980541, *Honda North*, BC EST #D043/99.

27. Second, the evidence presented should allow for objective findings of fact that demonstrate actual bias or a reasonable apprehension of bias. The rationale for this requirement is the principle that a party against whom an allegation of bias is made cannot explain away the circumstances in which the allegation arises or deny the presence of a biased mind. As noted by Laskin, C.J.C., in *P.P.G. Industries Canada Ltd. v. A.-G. Can.* (1976), 65 D.L.R. (3d) 354 (S.C.C.), "the introduction of evidence to explain away a situation which raised a reasonable apprehension of bias affecting that party's position in respect of a decision which he challenged" is not permitted.

28. A review of the record indicates that the Delegate obtained information from the complainants, as would be expected, and then made considerable efforts to obtain a response from the employer. The Delegate wrote to Spartan Refrigeration on July 26, 2005. The content of that letter indicates that Spartan Refrigeration was too busy at that time to deal with the complaint. Meetings were thereafter scheduled for September 26, 30 and October 3, 2005 but although scheduled and agreed to, neither Ash nor Willard attended those meetings. Finally, as noted above, the preliminary findings of the Delegate were mailed to Willard and Ash, summarizing these matters, in detailed letters dated October 18, 2005 and they were invited to take issue with those findings but did not do so. The Determination was finally issued in November, 2005.

29. In my opinion no evidence of bias has been shown.

ERROR IN THE DETERMINATION OF AMOUNTS DUE

30. The third issue concerns Gemperle's claim for wages. Willard indicates concern about discrepancies amongst some of the documents he supplied. Unfortunately there is no detail in the allegation that would allow it to be reviewed. As noted above, Willard and Ash were given the opportunity to comment on all of the specifics of this claim but chose not to do so. The bare statement that there is a discrepancy does not allow this Tribunal the opportunity to review this issue. Moreover, as noted by the Delegate, an appeal to this Tribunal is not a re-investigation of the complaint: *J.P. Metal Masters 2000 Inc.*, BC EST #D057/05.

SUMMARY

31. There is no error of law in the Determination of the Director that Willard and Ash, operating as Spartan Refrigeration, are the employers of Gemperle and Pfeiffer. There has been no bias shown in the investigation of the Director. There is no error demonstrated in the Director's calculation of the wages due.

ORDER

32. The appeal is dismissed. Pursuant to section 115 of the *Act*, the Determination of the Director is confirmed.

John Savage
Member
Employment Standards Tribunal